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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MCKENZIE BUILDERS, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA
CLARA COUNTY,

Respondent;

EAST WEST BANK,

Real Party in Interest.

H037334

(Santa Clara County

Super. Ct. No. 1-10-CV-163513)

ORDER MODIFYING OPINION
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on September 18, 2012, be modified in the following particulars:

1. On page 9, the entire second full paragraph beginning with “McKenzie’s efforts to distinguish . . .” is deleted and replaced with the following paragraph:

McKenzie’s efforts to distinguish *A.N.* do not change our conclusion. We do not read *A.N.* to apply *only* where there is “a lack of preparatory time or a looming trial date,” nor do we find it significant that McKenzie’s almost one-year delay was “less than half of the delay in *A.N.*” Here, EWB identified four specific ways in which it was prejudiced by McKenzie’s dilatory filing. Although McKenzie attempted to refute EWB’s first assertion of prejudice, it did not challenge EWB’s second and third assertions. With respect to EWB’s fourth assertion of prejudice, McKenzie derided the “sheer

ridiculousness” of the amounts claimed but, significantly, failed to deny that EWB had incurred some quantum of unnecessary fees and costs as a direct result of McKenzie’s delay. Thus, three of EWB’s four assertions of prejudice remained uncontested. The denial of McKenzie’s motion, on this record, was not an abuse of discretion. As we have already explained, the lack of an express finding of prejudice is of no moment here, because the order incorporates an implicit finding of prejudice.

The petition for rehearing is denied.

This modification does not affect the judgment.

Mihara, J.

Premo, Acting P. J.

Elia, J.